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file tariffs of any kind.[3] Thus, although Telocator endorses the Commission's proposals herein in the event RCCs may ultimately be required to file tariffs, it does not concede that any such requirement exists today.[4]

Telocator limits its reply comments to the central legal issue raised by AT&T in its opening comments: whether the FCC possesses the legal authority under the Communications Act to allow carriers to tariff only a range of rates or a maximum rate for their services.[5] As shown below, AT&T's contention that the Commission's proposal to permit such a tariffing practice is unlawful is grounded in case law interpreting another statute that simply is not applicable to the instant proceeding.

Relying on cases applying the Interstate Commerce Act ("ICA"), AT&T claims that tariffs containing ranges of rates

would cause carriers to violate Section 203(c)'s requirement that they collect only the filed rate.[6] AT&T also argues that prior FCC decisions require the "net charge" for every user to be specified independently in a tariff. It further contends that permitting users to take service at different rates within such a range would constitute a per se violation of Section 202(a)'s antidiscrimination requirement.[7] None of these assertions withstand analysis.

Initially, AT&T fails to recognize that the FCC has greater power than the Interstate Commerce Commission ("ICC") to modify its tariffing requirements, particularly as to the form of schedules filed. AT&T's reliance on the earlier cases interpreting the purported net charge and non-discrimination requirements is likewise misplaced, because it disregards the central finding of the Commission's Competitive Carrier proceeding that, by definition, non-dominant carriers cannot engage in unreasonable discrimination in violation of the Communications Act. Accordingly, Telocator submits that the FCC possesses ample legal authority under the Communications Act to permit non-dominant carriers to file tariffs containing a range of rates.

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[6] AT&T at 4-10. See 47 U.S.C. § 203(c).

[7] AT&T at 10-14. See 47 U.S.C. § 202(a).

II. THE COMMISSION POSSESSES AUTHORITY UNDER THE COMMUNICATIONS ACT TO LAWFULLY MODIFY THE SECTION 203 TARIFFING REQUIREMENTS TO ALLOW TARIFFS CONTAINING A RANGE OF RATES

Section 203(b)(2) of the Communications Act allows the FCC to "modify any requirement" of Section 203 "in particular instances or by general order applicable to special circumstances or conditions."[8] Specifically, as the Second Circuit Court of Appeals has stated, this provision confers the power to "modify requirements as to the . . . information contained in tariffs."[9] Although this power is not unlimited,[10] it is clearly sufficient to implement the Commission's proposed rules here.

Permitting the tariffing of rate ranges does not impermissibly eliminate any requirement of Section 203 in violation of AT&T v. FCC. That section provides that

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[8] 47 U.S.C. § 203(b)(2); see also MCI Telecommunications v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). Both the plain language of Section 203(b)(2) and Commission precedent indicate that the modification power applies to all of Section 203, including 203(a) and 203(c). See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier"); Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, 480 n.69 (1981); Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd 8072, 8075 (1992) ("Tariff Filing Requirements").

[9] AT&T v. FCC, 487 F.2d 864, 879 (2d Cir. 1973).

[10] In MCI v. FCC and more recently in AT&T v. FCC, the D.C. Circuit has determined the limits of this modification power: 203(b) does not allow the "wholesale abandonment or elimination of a requirement." MCI v. FCC, 765 F.2d at 1192.

carriers shall file schedules of charges; it leaves to the FCC the form that such schedules should take. In this case, that schedule would merely consist of a range of rates rather than one or more fixed rates.[11] Thus, by filing such a schedule of charges, non-dominant carriers will be in compliance with the strictures of the Act.

Similarly, Section 203(c), which provides that no carrier shall charge a different compensation than the charges specified in its schedule, is satisfied by a range of rates.[12] Under the Commission's proposal for non-dominant carriers, the specified charges will simply be expressed as those within the tariffed range and users will be apprised of the available rates. Non-dominant carriers will remain bound by the Act's requirement that the actual rate collected from users fall within that specified range. Therefore, adoption of the FCC's proposal to permit rate ranges does not eviscerate Sections 203(a) and 203(c) in contravention of the court's holding in AT&T v. FCC.[13]

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[11] 47 U.S.C. § 203(a).

[12] Id. at § 203(c).

[13] As the Supreme Court noted in American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967): "Regulatory agencies . . . are supposed, within limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

The cases cited by AT&T are not to the contrary. In both Maislin Industries, U.S. v. Primary Steel, Inc.,[14] and Regular Common Carrier Conference v. U.S.,[15] the respective courts rested their decisions on the strictures of Section 10761 of the ICA, which incorporates a particularly unyielding version of the "filed rate doctrine."[16] Because under the express terms of the ICA the ICC lacks the authority to modify the requirements of Section 10761, the courts were restrained to apply that "rigid" statutory mandate to preclude the off-tariff discounts that were at issue in both cases.

Unlike the ICC, however, the FCC possesses the authority to modify the requirements of Section 203(c) of the Communications Act, which is the corollary of Section 10761 of the ICA.[17] Moreover, the agency has not here proposed to permit off-tariff pricing, but only to permit the tariffed rates to be stated in terms of a range of permissible

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[14] 497 U.S. 116 (1990).

[15] 793 F.2d 376, 380 (D.C Cir. 1986).

[16] Maislin, 497 U.S. at 126-27; Regular Common Carrier, 793 F.2d at 379-80.

[17] See, e.g., Tariff Filing Requirements, 7 FCC Rcd at 8076. Federal Courts have long recognized that the Communications Act and the Interstate Commerce Act though related, differ in significant respects. See General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971); AT&T v. FCC, 503 F.2d 612, 616-17 (2d Cir. 1974).

charges. Thus, the Maislin and Regular Common Carrier cases are distinguishable both factually and legally from the instant case.[18] For the same reasons, the other ICC cases discussed by AT&T are inapposite.

The Commission's findings in its Competitive Carrier proceeding similarly dispose of AT&T's arguments that, under prior FCC precedent, a tariff must reveal the "net charge" to every customer and that any differential in charges among users constitutes a per se violation of the Section 202(a) proscription against unreasonable discrimination.[19] In Competitive Carrier, the FCC concluded that non-dominant carriers like RCCs were by definition incapable of providing service at unreasonable rates or engaging in unreasonable discrimination in contravention of the Act.[20] The D.C. Circuit in AT&T v. FCC expressly did not disturb these findings.[21] As a result, neither FCC cases dealing with dominant carrier regulation nor the Maislin Court's observations regarding the non-discrimination requirements of the ICA are relevant to the lawfulness of the Commission's proposed actions here. Rather, the agency's reliance upon

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[18] Those cases are in fact more comparable to the facts in AT&T v. FCC than the FCC's current proposals.

[19] AT&T at 4-5, 10-14.

[20] See, e.g., Competitive Carrier First Report and Order, 85 F.C.C.2d 1, 31 (1980).

[21] 978 F.2d 727, 736 (D.C. Cir. 1992).

the competitive nature of the marketplace in which non-dominant RCCs operate to police the Act's mandates is well grounded in prior precedent.

Federal courts have long recognized that, under the ICA and its progeny, differentials in rates are reasonable if made in response to competitive conditions that benefit the public interest.[22] In Associated Gas Distributors v. FERC, the court stated that "[f]or nearly 100 years . . . the courts have interpreted the antidiscrimination provisions of the Interstate Commerce Act to allow the ICC to approve differentials justified exclusively by competition."[23] Here, the Commission has likewise found that allowing non-dominant carriers pricing flexibility is justified by competitive conditions that further the goals of the Act and serve the public interest. Clearly, it would be disruptive to existing competitive markets and, therefore, contrary to the public interest to require non-dominant carriers to file tariffs containing greater specificity than that proposed.

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[22] See Texas & Pac. Railway v. Interstate Commerce Commission, 162 U.S. 197, 218-19 (1896). See also National Gypsum Co. v. U.S., 353 F. Supp. 941, 947 (W.D.N.Y. 1973) ("the carrier's necessity of meeting competitive conditions in order to retain business is an important consideration, which may provide a sufficient dissimilarity of conditions to warrant a reasonable difference in rates that will not be classified as unjustly discriminatory").

[23] 824 F.2d 981, 1011 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

This is especially true for the RCCs. As Telocator demonstrated in its opening comments, the radio common carrier market is intensely competitive.[24] In any given area, as many as 40 RCCs may operate in the 900 Mhz band

That is equally the case with respect to RCCs. The filing of tariffs containing a specification -- in the form of a range -- of all rates that may be charged satisfies the literal mandate of Section 203. The FCC's findings regarding the nature of the competitive marketplace for non-dominant carrier services demonstrate that the purposes underlying that section will be effectuated as well. Thus, the Commission may properly conclude that tariffs containing ranges of rates meet the requisites of the Communications Act.[27]

III. CONCLUSION

For the foregoing reasons, Telocator submits that the Commission possesses sufficient legal authority to adopt all of its proposed streamlined tariff requirements, including the range of rates proposal. The Communications Act affords the Commission a unique flexibility to modify the

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[27] See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) (agency's reasonable interpretation of its governing statute is due deference even when the agency's present construction of the statute is contrary to its past construction and application); FCC v. WNCN Listeners guild, 450 U.S. 582, 598 (1981) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ."") (quoting Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)); American Trucking Assns, Inc. v. T & S.F.R. Co., 387 U.S. (1967) (even when faced with a long history of the Commission's construction and application of the Act contrary to its present position, courts must defer to the Commission's interpretation of the statute it administrates).

implementation of its statutory obligations consistent with sound policy findings that promote the goals of the Act and the public interest.

Respectfully submitted,

TELOCATOR, THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Thomas A. Stroup

Thomas A. Stroup
Mark Golden
TELOCATOR
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 467-4770

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